No. 13,600

IN THE

United States Court of Appeals

For the Ninth Circuit

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,

Appellant,

vs.

SCHENLEY INDUSTRIES, INC.,

Appellee.

CHARLES W. EBNOTHER, Trustee of the Estate of Hedgeside Distillery Corporation, Bankrupt,

Appellant,

vs.

SCHENLEY INDUSTRIES, INC., a corporation,

Appellee.

APPELLANTS' CLOSING BRIEF.

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APPELLANTS' CLOSING BRIEF.

I.

ONLY QUESTIONS OF LAW ARE PRESENTED.

One thing is quite apparent in a reading of the Appellee's response to the appeal taken herein and that is that the Appellee is so shaky in its legal

contentions that it seeks to deprive this Court of the right of review by arguing that there is a conflict in the testimony before the Referee in Bankruptcy upon which he and the District Court have made findings and that accordingly there is nothing which this Court can overturn. This contention is repeated constantly throughout the brief (pp. 2, 3, 4, 10, 11, 14, 15, 17, 20, 26, and 36). This argument is entirely without merit. The evidence before the Referee was in large part documentary and we know of no instances where the testimony of witnesses was in conflict. The same argument was presented by the Appellee to the District Court when that Court was reviewing the findings and order of the Referee. Such contention was rejected by the District Court who held (R. 95),

> "The Court is inclined to agree with the Trustee and the Bank that there are no substantial issues of fact presented to it for determination.
>
> "That being the case, the only questions presented here are those of law. In such a situation, it is familiar doctrine that a reviewing court must exercise its independent judgment."

The District Court then closed its opinion (R. 132) with the following statement:

> "Under all the facts, *which are undisputed* and under all the legal principles applicable to those facts, to deprive Schenley of what, in good faith, it bought and paid for, would be 'rigor and not law.'

> "The Referee's findings of fact and conclusions of law, except as hereinbefore noted, and his order are approved and affirmed." (Italics ours.)

Not only has the Appellee not presented any evidence showing a conflict of material facts but it is seeking to overthrow the findings of the very District Court whose order it is relying upon to support its position.

II.

HEDGESIDE DID NOT QUALIFY AS A WAREHOUSEMAN UNDER THE CALIFORNIA WAREHOUSE RECEIPTS ACT.

The Appellee states (Appellee's Brief, p. 20) that "the trial courts found *as a fact* that Hedgeside operated a warehouse business 'for profit'." (Italics ours.) No such "finding of fact" appears either in the order of the Referee or the District Judge (R. 16-30, 78-132). The Court below did hold, *as a conclusion of law,* that Hedgeside was storing "for profit" *within the meaning of the California Warehouse Receipts Act* (R. 122). It did so, as is abundantly clear from the Court's opinion, solely because of an erroneous conclusion that it was only necessary to charge *something* to be in the business of storing "for profit" within the meaning of the Act (R. 115-122). That it decided the case on that grounds is corroborated by the fact that Appellee, until the preparation of its brief filed with this Court, steadfastly argued to the Referee and the District Court

that to qualify as a warehouseman under the California Act it was only necessary that "a charge" be made. At page 21 of Appellee's Brief filed with this Court Appellee argues that " 'For Profit' in the Uniform Act means *'for compensation'* or *'for hire'* and is nothing more or less than a codification of the common law distinction between a *gratuitous* bailee and a *bailee for hire.*"

This same argument was made, in the identical language, in Appellee's Brief filed with the District Court (p. 30), and the case was not only argued to the Referee on that basis by the Appellee but tried on that basis, and that is one of the reasons that Appellee never attempted to introduce any evidence below on the question of whether or not Hedgeside was in the business of warehousing for profit. It is certainly partly the reason that it is unable to point to any evidence taken by the Court below which would support a finding of fact that Hedgeside was in the business of storing for profit. The other and more important reason is, as is borne out by the testimony of Mr. Logan, Hedgeside never intended to make a profit on its warehousing. In short, this case, up until now, has been tried by the Appellee on the basis that if Hedgeside charged as much as the traditional peppercorn for storage that that constituted being in the business of storing for profit within the meaning of the California Act. The fallacy of this wholly unsupported statement of the law has been briefed by us at pages 14-22 of our Opening Brief and, ac-

cordingly, rather than repeat same at this time we refer the Court to the analysis there appearing. Appellee has made no attempt to answer this analysis other than to quote the opinion of the District Court. Such a procedure will avail the Appellee nothing as the District Court adopted *in toto* the fallacious argument of the Appellee.

To add confusion, however, Appellee now recedes from its former position for the first time and attempts to argue that the Referee and District Court found "as a fact" that Hedgeside was in the business of storing for profit. (Appellee's Brief, pp. 15-20.)

This change of heart and position comes too late as the factual record was established under the previous erroneous theory of law. Outside of the fact that one is not permitted to reverse his legal position in the trial of a case for the first time in the appellate court (*Sacramento Suburban Fruit Lands Co. v. Melin,* 36 F.2d 907 (9th Cir. 1929)), Appellee runs into the difficulty that it has not produced in the Court below evidence to support the burden of proof imposed upon it. Appellee attempts to skim over this defect by arguing (Appellee's Brief, p. 11) that "any presumptions on this appeal are in support of the judgment,". But the plain facts are that at the time of bankruptcy Hedgeside had possession of the grain spirits which the Appellee sought by reclamation petition to obtain the possession of. Such goods were produced by Hedgeside, sold to the Appellee, and the possession retained by Hedgeside. Under the circum-

stances, there is a *conclusive* presumption by California law (*Civil Code,* §3440) that said transfer was void as to the creditors of the vendor unless the buyer (Appellee) can bring itself within the terms of a statutory exception to Section 3440. The burden of proof of showing qualification under such exception lies upon the person claiming it. (See authorities, Appellants' Brief, pp. 11-12.) There is no conceivable statutory exception to §3440 under which Appellee might qualify except *California Civil Code* §3440.5 which provides that, in lieu of transfer of the goods, warehouse receipts must have been issued and delivered by a "warehouseman" as defined by the California Warehouse Receipts Act. In order for the Appellee to qualify under this exception it was obligated to show *strict* conformance.

One of such qualifications was that the issuer of the receipt be "engaged in the business of storing goods for profit." Appellee failed to so qualify as it failed to introduce *any* evidence to show Hedgeside was engaged in the business of storing for profit. All that the Appellee did in the Courts below was to show that "a charge" was made. It made no effort to show the cost or expenses of warehousing by Hedgeside. It did not even attempt to refute by other testimony the testimony of Mr. Logan, the Sales Manager and Officer and director of Hedgeside, who signed most of the receipts upon which the Appellee here relies, to the effect that no attempt was ever made to determine whether or not the transaction of warehousing was itself profitable as that term is commonly used

(R. 878). It now argues that Mr. Logan, although Sales Manager, Officer and Director, and the signer of most of the warehouse receipts, was not informed as to what Mr. Stone, the President of Hedgeside (which is a corporation by the way), subjectively intended. Yet no attempt was made by Appellee to produce testimony from Mr. Stone either by deposition or otherwise to that effect. No argument was ever made to either the Referee or the District Court that Mr. Logan's testimony was not to be believed for any reason. Nor did the Referee or District Court ever raise such a question. In fact, the District Court conceded that the testimony below was "undisputed".

For the first time, in this Court, the Appellee refers to the fact that there were an infinitesimal number of receipts issued in which the warehouse charge was 20¢ per barrel per month instead of the usual 10¢— and this is true even though appellants introduced evidence of the published rates of warehousemen operating internal revenue bonded warehouses and storing for a profit in communities other than the community in which Hedgeside was located, which rates were more than 100% higher than the usual rate of 10¢ charged by Hedgeside. And this is true even though Appellee must have recognized that it had the burden of proof of showing qualification under any exception (§3440). Appellee never attempted to make any detailed comparison between the warehousing operation of Hedgeside and the warehousing operation of public warehouses admittedly lawfully in the business of storing for profit. All Appellee did

was to induce the Referee and District Court to enter orders which are in error because based upon unsound legal principle—and then when that principle is being brought to light before this Court attempt to preclude review by arguing that legal conclusions of the Referee and District Court are findings of fact based upon conflicting evidence.

As previously pointed out, Schenley has never mentioned the existence of a 20¢ storage charge for some barrels in any argument heretofore advanced before either the Referee or District Judge. The number of barrels stored under said 20¢ charge is small as compared to the thousands of other barrels subject to the customary 10¢ storage charge. In the main, the 20¢ charge was imposed under storage contracts executed during a two month period (August 29, 1946 to October 28, 1946) with Schenley for potato spirits. In only five instances were similar contracts entered into with respect to grain spirits, and this was only during a three-week period in 1946 (October 7, 1946 to October 29, 1946). A few drums of neutral grape lees brandy and raisin brandy were also stored subject to a 20 cent charge. In view of the short period of time during which 20 cent storage contracts were executed, the small quantity of merchandise subject to this charge, and the fact that the *product* covered by a 20 cent charge was not regularly stored or produced by Hedgeside (the overwhelming bulk of its business was in the production and sale of whiskey and grain spirits and not potato spirits or neutral grape lees or raisin brandy) the 20 cent charge may only be

regarded as exceptional and of no significance unless it be taken as an indication that Hedgeside recognized that at its customary 10 cent rate, applicable by the way to the precise merchandise now in dispute, it lost money on its storage.

At pages 17 and 19 of its brief Schenley attempts to discount the significance of Hedgeside's customary 10 cent storage rate as compared to the 20 cent rate charged by metropolitan warehousemen by implying that there was some sort of quantity discount in effect at Hedgeside which was responsible for its lower rate. This contention is utterly fallacious. In the first place, under Schenley's production contracts (Pet.'s Exhibits Nos. 15 and 22B) Schenley paid only 10 cents if it stored one barrel or ten thousand barrels. It was required to store nothing, and could withdraw all storage at any time it chose. In no sense did Schenley receive a low rate in consideration of alleged "bulk storage". Secondly, if "bulk storage" permits a lower rate (and Schenley has produced no evidence to that effect) this fact would redound to the benefit of metropolitan warehousemen and their customers, not to Hedgeside. For the greatest quantities of spirits and whiskey are naturally stored in the areas of greatest demand. In short, if Schenley's "quantity discount" theory be accepted one would expect the storage rate in San Francisco, Stockton and Sacramento to be lower than the Hedgeside charge.

III.

GOODS STORED IN AN INTERNAL REVENUE BONDED WAREHOUSE ARE NOT EXEMPTED FROM THE APPLICATION OF CIVIL CODE §3440.

Schenley's next argument is that §3440 of the *California Civil Code* does not apply in the case of goods transferred into storage in internal revenue bonded warehouses. It is conceded by Schenley, in this instance at least, that the Courts below were only confronted with a legal question (Appellee's Brief, p. 27). Schenley's argument appears at pages 27 to 35 of the Appellee's Brief and consists in large part of a mere quotation of the statements made by the District Court in its opinion. The erroneous position taken by the District Court in its opinion is fully covered in Appellants' Brief, pages 23 to 33, inclusive. Accordingly, we shall only address ourselves now to the few contentions made by Schenley in its Answering Brief which might be deemed to go further than the District Court did.

First, Schenley contends (Appellee's Brief, p. 32) that "Pennsylvania, Kentucky and Maryland all have a bulk sales law similar to California Civil Code §3440" and for that reason cases from said jurisdictions exempting distilleries from the requirements of a change of possession are persuasive here. With this argument we are sharply in disagreement as, in the instance of Pennsylvania, the case of *Taney v. Penn. Nat. Bank,* 187 Fed. 689 (3rd Cir. 1911), relied on by Schenley, arose under common law based upon the Statute of Elizabeth (13 Elizabeth, C. 5) (p. 696

of the opinion). The Pennsylvania Court there cited *Stevens v. Gifford,* 137 Pa. 219, 20 Atl. 542 (1890) wherein it is stated that Pennsylvania had no bulk sales statute whatsoever. In other words, at the time of the *Taney* decision there not only was no statute similar to the California statute but there was no statute at all.

In the case of Kentucky, Schenley refers to the cases of *Bache v. Hinde,* 6 F. 2d 508 (6th Cir. 1925), and *Brown v. Cummins Dist. Corp.,* 53 F. Supp. 659, 664 (D.C. Ky. 1944). Neither case involves the requirement of a transfer of possession or refers to any Kentucky statute on this point.

In the case of Maryland, *Merchants Nat. Bank v. Roxbury Distilling Co.,* 196 Fed. 76 (D.C. Md. 1912), is cited. That case did not involve law, such as exists in California, conclusively presuming a retention of possession as fraudulent, as we pointed out in more detail at page 31 of our Opening Brief.

Schenley attempts to distinguish (Appellee's Brief, p. 33) the two "joint custody" California cases referred to in Appellants' Brief by stating that *Newell v. Desmond*, 63 Cal. 242, 15 Pac. 369 (1883), involved a transfer from one partner to another partner and that the case of *Haster v. Blair,* 41 C.A.2d 896, 107 P.2d 933 (1940), a transfer from one tenant in common to another. This attempted differentiation is difficult to follow as the transfers in each case were to third parties and not to either a partner or a tenant in common.

The case of *Brown v. O'Neal,* 95 Cal. 262, 30 Pac. 538 (1892), is another decision in which §3440 was applied to a transfer from one tenant in common to an outsider.

We have no quarrel with the statement that *Wells Fargo Bank v. Haslett W. Co.,* 60 Cal.App. 225, 212 Pac. 647 (1923), holds that storage of goods in a United States bonded warehouse is notice of the fact that the United States controls the release of such goods but we do deny that such proposition has any relevancy here. *See, Joseph Herspring v. Jones,* 55 Cal. App. 620, 203 Pac. 1038 (1921).

An examination of the legislative history of §3440, *California Civil Code* (Appellant's Opening Brief, pp. 24-25) unearths the fact that in 1951 the legislature made an exception to §3440 so as to permit the storage of *brandy* by the vendor or producer in its warehouse without bringing into play the conclusive presumption of §3440. Such amendment and exception did not include whiskey or grain spirits. Accordingly, the maxim *expressio unius est exclusio alterius* comes into full play and we must reach the conclusion that such exception in the case of whiskey and grain spirits was not intended by the legislature. Schenley's only answer to this contention is by way of a footnote on page 34 of its Answering Brief in which it is stated that since there were only one or two distilleries (of whiskey and grain spirits) in the State of California it seems likely that the California legislature had no intention either way, or that it simply did not consider the

point. Such is certainly a nonchalant answer but we submit a wholly ineffective one. The tax on brandy is as high as on whiskey or grain spirits and it must be met unless the goods are stored in an internal revenue bonded warehouse within 72 hours, just as in the case of whiskey and grain spirits. *No argument has been advanced by the Referee, the District Court, or Schenley, as to why brandy should be treated any differently in the California change of possession statute than whiskey or grain spirits.* Yet in the case of brandy our California legislature took the position that no statutory or case law exception to §3440 existed in California with respect to the storage of brandy in an internal revenue bonded warehouse. If that be true, and it cannot be denied that it is true, then our legislature must have considered that no statutory or case law exception existed in the case of whiskey and grain spirits.

Not only that, but in passing such legislation, in the case of brandy, our California legislature must have recognized that distillers were not "warehousemen" as defined by the California Warehouse Receipts Act at the time of the passage of the brandy amendment, which was 1951. Otherwise, a distiller of brandy could have claimed exemption under §3440.5 of the *California Civil Code,* just as Schenley is presently claiming, and we insist erroneously so, in the case of grain spirits.

In the case at bar, an act of the California legislature (§3440) and an amendment (§3440.5) placing a

limitation or exception thereon is being construed and not only is Schenley deviating from the usual usage of the simple and unambiguous words employed therein but is urging a liberal construction in the case of an exception, which should always be strictly construed. And it is doing so notwithstanding the fact that the legislature has clearly indicated its intent by passing a further amendment and exception to §3440 in order to permit a producer of brandy, a commodity in the identical position as whiskey and grain spirits, to escape the operation of said §3440. If Schenley's position were sound, a brandy producer could escape the section's effect through Amendment 3440.5 and there would have been no need for the legislature to pass a further exception. In like manner, if storage in an internal revenue bonded warehouse precluded the operation of §3440 in the case of whiskey and grain spirits, it would also preclude the operation of said section in the case of brandy, as the commodities are produced, distributed, and taxed in the identical manner.

IV.

THE GOODS WERE NOT KEPT "AT THE WAREHOUSE".

Schenley contends (Appellee's Brief, pp. 11-14) that Hedgeside met the requirement of Amendment 3440.5 that a copy of each warehouse receipt be kept "at the warehouse" where the goods covered are stored as well as "at the principal place of business" of the

warehouseman, since it kept duplicate copies of the original warehouse receipt at the principal place of business or in a small vault in the office building of the distillery. The District Court agreed, as did the Referee, that there is no dispute whatsoever as to the physical facts. The difficulty arises purely in the construction of the meaning of §3440.5. The District Court concluded that the preposition "at" was less definite than the preposition "in". With this statement we do not disagree. Our position is that §3440.5 presents an exception or limitation upon the operation of §3440. Therefore, it must be construed strictly. The preposition "at" does not necessarily mean "in" but it is most frequently used interchangeably with "in". In other words, they are synonyms.

Webster's New International Dictionary:

> "*Syn.* AT, IN. When reference to the interior of any place is made prominent, IN is used: When a place is regarded as a mere local point, AT is more commonly employed; as, to look for a book *in* the library, to meet a friend *at* the library; 'he appointed regular meetings of the States of England twice a year *in* London' (*Hume*); 'an English king was crowned *at* Paris' (Macaulay). *In* is used before the names of countries or districts and (usually) of large cities; as, we live *in* America, *in* New York, *in* the South. *At* is commonly employed before names of houses, institutions, villages, small towns; as, Milton was educated *at* Christ's College, money collected *at* the customhouse, I saw him *at* the jeweler's, we live *at* Concord."

The amendment does not necessarily require that copies be kept inside the warehouse under the lock and key in the control of the storekeeper-gauger but it certainly does require that copies be kept within the confines of the warehouse building and not in the main office of the distillery, located in a separate building in no way physically connected with the warehouse, where an entirely different operation is being conducted. Had the legislature intended only that a copy be kept on the premises where the warehouse is located it would appear that they could easily have so stated. If each provision of the amendment is given due weight there would appear to be no logic in having a provision that a copy be kept "at the principal place of business" as well as "at the warehouse" if the latter requirement could be complied with by merely keeping two copies at the principal place of business. Furthermore, it appears absurd to prepare and keep two copies at the principal place of business when one copy would serve just as well. The District Court emphasized the provision of the amendment requiring that a copy be "open to inspection". What possible benefit is the right to inspect a copy of the warehouse receipt if the goods covered may not be inspected at the same time because in a locked warehouse? Why need there be a copy at the warehouse as well as at the principal place of business if inspection is to be guaranteed only as to the copy and not as to the commodity covered? An interested owner and lawful holder of the original receipt could just as well inspect the copy at Timbuktu as at a separate building in the neighborhood

when the goods covered are under lock and key and the key held by a difficult-to-find government agent. What the legislature obviously intended was that there be the opportunity to inspect a copy of the warehouse receipt at the main office or principal place of business and a right to inspect a copy along with the goods at the warehouse. It appears to us that Hedgeside recognized this situation when it made out duplicate copies of warehouse receipts. It failed, however, to keep one of the copies "at the warehouse".

V.

HEDGESIDE'S LICENSES DID NOT QUALIFY IT AS A "WAREHOUSEMAN".

To qualify as a warehouseman under the California Act one must be lawfully engaged in the business of storing. If, in its storing operation, Hedgeside did not comply with the laws and regulations promulgated in connection with or by any state or government agency, it is not lawfully qualified to do business as a warehouseman under the California Act. The federal and state licenses issued to Hedgeside, and referred to at pages 7, 8, 14, and 15 of Appellee's Brief, did not convert Hedgeside into a warehouseman as defined by the California Act. The federal license only evidenced compliance with the federal regulations contained in 26 C.F.R. 185. The state licenses only evidenced compliance with the regulations of the California taxing authority. Neither of them *ipso facto* qualified the bankrupt "to engage in the business of storing goods for profit" as required by

the California Warehouse Receipts Act. In short, the federal and state laws and regulations, under which said licenses were issued to Hedgeside, are designed to further the enforcement of certain federal and state tax statutes. They go no further. As evidence concerning the issues in the case at bar said licenses have only a negative value, for without them Hedgeside would have been storing spirits *unlawfully* and thus would have failed to satisfy the definition of "warehouseman", whether or not in so storing it was also "engaged in the business of storing goods for profit". Notwithstanding, the possession of said licenses in no sense satisfies the *additional* requirements of the applicable statute as stated in the last quotation.

VI.

CONCLUSION.

Schenley in its Answering Brief has added nothing in the form of legal arguments to the legal conclusions of the District Court and Referee. The material facts, as found by the District Court, are undisputed. This review requires nothing more than that a proper construction be placed upon three unambiguous California statutes consonant with the decisions of this state. §3440 of the *California Civil Code* is in full play and requires a holding that the transfer of each of the 4,484 barrels of grain spirits, in the possession of the bankrupt at the time of bankruptcy, be held to be conclusively fraudulent as against the creditors, unless this Court is prepared to hold that Hedgeside was a warehouseman as defined in the Cali-

fornia Warehouse Receipts Act. This Court is in as good a position as the District Court was to determine that question. There is no evidence upon which one could base a finding that Hedgeside was "lawfully engaged in the business of storing goods for profit", therefore it was not a "warehouseman" as defined in the California Warehouse Receipts Act. There is no statutory exception to the operation of §3440 in the case of "grain spirits" other than by one "storing goods for profit" and there is no California decision holding that storing in an internal revenue bonded warehouse defers the operation of §3440. We respectfully submit that the District Court's opinion and order should be reversed as to said 4,484 barrels of grain spirits.

Dated, San Francisco, California,
September 28, 1953.

Respectfully submitted,

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